No. 12440

United States
COURT OF APPEALS
for the Ninth Circuit

HUGO V. LOEWI, INC., a Corporation,
Appellant,

vs.

FRED GESCHWILL,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

FILED

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STATEMENT OF CASE

It is said repeatedly in the plaintiff's brief that the only claimed defect of the hops rejected by the defendant was that they had a "touch" of mildew. In fact, the hops were rejected because of substantial and serious damage of the baled hops by reason of mildew (Tr. 433, 434).

The plaintiff relies heavily upon his assertions that the defendant knew of the mildew in the plaintiff's cluster yard at the time the contract was executed and when the harvesting advance was made by the defendant. These are based on Mr. Fry's testimony that he saw the cluster hops on the vines on August 17th when he drove past a part of the yard on his way to the plaintiff's house (Appellee's brief 9). That was at night, after dark, and Mr. Fry did not go into the cluster yard. The plaintiff testified that he did not mention the mildew to Mr. Fry and that he did not know whether anyone connected with the defendant looked at the cluster crop prior to the harvest. The plaintiff did not claim that he ever mentioned the mildew condition to anyone connected with the defendant at any time prior to or at the time of the harvest advance. There is absolutely no evidence that the defendant or anyone acting for it knew that there was any mildew in the plaintiff's cluster yard when the contract was executed or when the advance was made (Tr. 152, 153, 292, 312).

The plaintiff states, page 14, that the defendant decided to go through the "form" of a full inspection, implying that the defendant did not inspect and reject the plaintiff's hops in good faith. Such implication is without foundation in the record. This subject is covered in the defendant's brief, pages 6 to 10.

The plaintiff's statement, page 16, that at the time the inspection was made the defendant's local representatives had been instructed to reject the hops, is misleading. By "inspection" the plaintiff is evidently

referring to the drawing of the tryings and the 10th bale samples and weighing of the bales on October 10th. Previously, on September 25, 1947, the defendant had wired its Oregon representative that three preliminary samples of the plaintiff's hops were of poor quality, full of stems and blighted hops, and were rejected. On the next day the defendant withdrew that instruction and requested its representative to secure 10th bale samples and send them to New York where the defendant itself would make the final decision (Ex. 17, Tr. 84, 86, 442, 472). The following is taken from that letter of September 26:

> "We confirm our instructions to you that you are not to accept any off-grade lots for our account. Where quality is doubtful, whether it is on cheap prices or high priced contracts, we want you to inspect and grade the hops, and send us 10th bale samples representing each grade. The final decision on rejection or acceptance will be made by us after we have examined the samples."

There is no evidence whatever to support the statements in the plaintiff's brief that the market was "very limited," and that the market price was falling or had fallen, at the time the defendant was considering the plaintiff's hops and at the time of the rejection. It is undisputed that throughout 1947 there was a scarcity of prime quality cluster hops, and that the market for such hops remained constant throughout September, October and the greater part of November of that year (Tr. 246, 362, 405, 416, 440, 446, 475, 476, Ex. 33, Tr. 285).

The defendant did not contract for plaintiff's hops

as a market speculation. Its contract purchases from growers were covered by its contract sales to brewers, so that hops it rejected had to be replaced by spot purchases in order to fill its brewer commitments (Tr. 440, 437, 453).

For clarity, the discussion herein of plaintiff's argument is grouped under the appropriate numbered headings of our original brief.

I

The plaintiff argues that mildew is not a form of mold within the contract requirement that the hops shall be free of mold. It is uncontradicted, however, that mildew is a form of mold (Tr. 366, 370).

Plaintiff's contention, page 23, that there is substantial evidence that these hops were of prime quality and met each of the descriptive phrases in the contract, is based upon plaintiff's statement, in answer to his counsel's leading question, that his hops were of prime quality. The plaintiff acknowledged on cross-examination, however, that what he meant by prime quality was average quality for the year in the Willamette Valley, and that he judged each factor of quality on that same "average" basis. He admitted that his hops were infected by mildew to the extent of 5% of his crop (Tr. 144, 176, 178, 179). The plaintiff's witnesses on the quality of his hops also based their opinions on this "average" standard or simply testified that the hops were "good hops" (Tr. 209, 223, 240, 276). His witness,

Walker, testified these hops were "good, merchantable" but not prime quality (Tr. 276).

Plaintiff's criticism of the testimony based on examination of the samples of his hops is not tenable. It is no answer to this testimony to say that it was not based on examination of the hops on the vines. Baled hops are judged in the trade entirely by such samples. The condition of the hops on the vines is wholly immaterial, as the defendant's contract was for hops fully processed and in bales, not hops growing on the vines. Mildew damage appearing in samples of baled hops is readily apparent. It is complete when the hops are baled and cannot thereafter increase in such samples no matter how old and "deteriorated" the samples may be (Tr. 366-368, 476). There is no evidence, and the plaintiff has not contended, that the hop samples introduced in evidence by the defendant and examined in court by the expert witnesses were not representative of the bales from which they were drawn.

The trial court's refusal to find that the plaintiff's hops were of prime quality, and its finding simply that the hops were merchantable, forces the plaintiff into the untenable position of contending that "merchantable" hops meet the express requirements of the contract. The gist of the plaintiff's argument is that if the hops were merchantable at some price, the defendant was bound to accept them as prime quality and to pay the market price of prime quality. This amounts to saying that a contract buyer of Grade No. 1 of a commodity must accept the seller's tender of Grade No. 3, and pay the

No. 1 price, simply because there is a market for No. 3 grade at some price.

The plaintiff's definition of "merchantable" as meaning "of a quality such as will bring the ordinary market price" (XV of Appendix) shows the extremity of his position. The record shows that hops of various types and qualities are sold at different prices. Some brewers will buy low quality hops at bargain prices. There is no evidence, however, that the plaintiff's cluster hops could have been sold for the "ordinary market price" which prevailed for prime quality hops when these hops were rejected. In fact the plaintiff himself admitted that after the hops were rejected by the defendant he offered them unsuccessfully for 5¢ per pound under the prime quality market price. Thus the plaintiff's hops did not qualify even under his own definition of merchantable (Tr. 185, 446). Furthermore, only literal compliance with the contract description and warranty is sufficient to justify a recovery of the price, irrespective of whether or not the product tendered is "merchantable." The plaintiff's statement, page 30, that his hops were "equal to the average actually accepted in the trade that year under prime quality contracts," is not supported by the record. There is no evidence as to what was the average quality hop in 1947, or the average which was accepted under prime quality contracts, or as to the quality of hops accepted under prime quality contracts and for which prime quality prices were paid.

Acceptance of hops which had been covered by prime quality contracts but were taken by the buyers at prices

considerably less than the prime quality contract price, is of no avail to the plaintiff here, as he seeks to recover the prime quality contract price for a product which he admits did not meet the quality specifications of the contract.

There is no evidence whatever to support the plaintiff's statement, page 34, that "these were such hops as were actually accepted in the trade as prime quality." The evidence that mildew-damaged hops were taken in under prime quality contracts means nothing in the absence of evidence that the buyer paid the prime quality price for those hops. Furthermore, collateral transactions, and what other buyers may have done, cannot bind this defendant.

The plaintiff attempted to show that his hops were of average quality for the year. We believe we have established in our brief that "prime quality" cannot by any stretch of the imagination be construed to mean "average quality," and that, in fact, the application of such a standard in judging hops would be wholly impracticable and an absurdity. That argument has not been answered by the plaintiff.

II

The plaintiff's argument that the defendant did not rely on the plaintiff's warranty of the quality and condition of his hops, is based entirely on the premise that the defendant knew when it executed the contract that the hops were mildewed. As heretofore pointed out,

there is no evidence whatever that the defendant knew at that time of any mildew in the plaintiff's hops.

Furthermore, it is well settled that the execution of a contract containing a warranty by the other party constitutes a reliance upon that warranty. 4 *Williston on Contracts,* Section 972.

Finally, it is not necessary to base the defendant's case upon breach of warranty. The plaintiff agreed to sell hops of a certain description. The hops tendered did not meet that description.

The plaintiff has admitted that the hops tendered did not meet the express contract requirements. He is thus forced to fall back upon what he contends was a "substantial performance" of the contract. We submit that the record shows clearly there was no such performance. However, as set forth in heading II of our original brief, the authorities establish that substantial conformity to the contract description of the goods is not sufficient to meet the contract requirements. Actual conformity is essential for recovery of the price.

The doctrine of substantial performance has been applied almost exclusively in cases involving construction contracts. From the beginning it was acknowledged to be a departure from the fundamental principles of contract law and was invoked to avoid the harsh consequences of the strict application of contract principles in cases in which the builder failed to complete the contract in a small number of minor details. Even in such cases, the builder is compelled to ask that his non-performance be excused, and to present evidence of the

cost of the performance with respect to which he is in default, in order that the contract price may be reduced by that amount.

Here we have an action for the entire contract price of goods concededly of inferior quality and the effect of the judgment is that the defendant is required to pay the contract price for inferior goods.

The plaintiff contends that the hops delivered by him to the warehouse were "good merchantable" hops. While the trial court found that such hops were "merchantable," not "good merchantable," that is far from a finding that the hops delivered to the warehouse conformed to the contract description. The expression "merchantable" and "good merchantable" do not appear in the description in the contract, nor is there any evidence in this record that hops which are "merchantable" or "good merchantable" meet the contract description.

There is not the slightest evidence in this case, furthermore, that the term "merchantable" or "good merchantable" has any trade meaning or any certain meaning whatever. The word "merchantable" actually means "salable" but hops which are merely salable at some price certainly do not meet the standards of quality set forth in this contract in definite terms.

In *Wolf v. Edmunson,* 240 Fed. 53, in referring to merchantability, the court simply told the jury that they were to consider the value of the hops in the market rather than their chemical content or inherent value, inasmuch as the contract was made with the market value in view.

There are several answers to the plaintiff's contention that the defendant waived the contract description or warranty and is estopped to rely upon it (Appellee's brief 36, 37, 40-45).

The judgment in this case is based solely on the plaintiff's performance of his contract. The findings of fact and conclusions of law make no mention of either waiver or estoppel. The plaintiff therefore cannot now support this judgment on the ground of waiver or estoppel. *McMillan v. Montgomery*. 121 Or. 28, 253 Pac. 879.

Finding of fact No. 6, relied upon by the plaintiff as a finding of waiver, cannot be so construed without being directly inconsistent with the express findings of fact and conclusion of law that there was complete performance by the plaintiff. These findings and conclusion that the plaintiff fully performed, amount in effect to a finding that there was no waiver. Such inconsistency would itself require a reversal of the judgment.

> *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 78 L. Ed. 859, 54 S. Ct. 443.
> *Winnett v. Helvering*, 68 Fed. 2d 614 (C.C.A. 9).

Waiver or estoppel cannot arise out of the execution of the contract for the reason that the defendant had no knowledge at that time that there was any mildew in the plaintiff's yard.

Waiver or estoppel cannot arise out of the making of the harvesting advance to the plaintiff for the reason that there is nothing in this record to establish that at the time the advance was made, several days before harvest was

commenced, the defendant had knowledge of any mildew in the plaintiff's yard. The finding that at the time of picking the defendant had such knowledge is, of course, immaterial as the picking was not commenced until several days after the advance was made.

A waiver is an intentional relinquishment of a known, existing right. *Dickerson v. Murfield,* 173 Or. 662, 147 Pac. 2d 194.

An intention to waive a right can be established only by clear, convincing, and unambiguous evidence. The intention must be free from doubt. *Bankers Trust Co. v. Economy Coal Co.,* 224 Ia. 36, 276 N.W. 16.

There can be no implied intention to waive a right, that is, one based on conduct or omissions, unless such conduct or omissions are inconsistent with an intention to insist upon such right. *Mundt v. Mallon,* 106 Mont. 242, 76 Pac. 2d 326. *Concrete Engineering Co. v. Grande Building Co.,* 230 Mo. App. 433, 86 S.W. 2d 595.

A waiver is a voluntary act which implies a choice by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted upon. Voluntary choice is the very essence of waiver; acts done under the compulsion of a contract cannot form the basis for a waiver. *Industrial Work v. Mitchell,* 114 Mich. 29, 72 N.W. 25.

A waiver cannot be given effect unless it is supported by consideration, or unless the conduct or omissions on which it is based are such as to give rise to an estoppel. *Craswell v. Biggs,* 160 Or. 547, 86 Pac. 2d 71.

To constitute an estoppel, there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it. *Marshall v. Wilson,* 175 Or. 506, 154 Pac. 2d 547.

An estoppel may be established only by clear, precise, and unequivocal evidence. *Spence v. Washington National Insurance Co.,* 320 Ill. App. 149, 50 N.E. 2d 128. It cannot rest upon conjecture or inference. *Augusta Trust Co. v. Augusta H. & G. R. Co.,* 134 Me. 314, 187 Atl. 1.

The equity must be strong and the proof clear to deprive a party, by means of an estoppel, of his right to rely upon the truth. *Craswell v. Biggs,* 160 Or. 547, 86 Pac. 2d 71.

There can be no estoppel unless it is shown that the representations of the one sought to be estopped were relied upon by the other party to his detriment. *Marshall v. Wilson,* 175 Or. 506, 154 Pac. 2d 547.

The defendant respectfully contends that the application of these principles precludes a decision that there was a waiver in this case or that an estoppel arose out of either the execution of the contract or the making of the advance.

IV

Section 63(3) of the Uniform Sales Act

The plaintiff's contention, page 62, that the defendant's knowledge that the hops were warehoused and obtainable on payment of the price amounted to the notice required by the statute, is contrary to the plain weight of authority.

Lannom Mfg. Co. v. Strauss Co., 235 Ia. 97, 15 N.W. 2d 899, cited by the plaintiff, was an action for the price of shoes. Defendant cancelled his order after plaintiff had started their manufacture. Plaintiff shipped the shoes, defendant refused to accept, and the carrier then notified the plaintiff, who declined to have anything to do with them. The carrier placed the shoes in storage where they remained to the time of trial. The only discussion of notice in the court's opinion is in these words:

> "Plaintiff has attempted to deliver the goods to defendant and has treated them as belonging to defendant. This was the equivalent of offering to deliver the goods and notifying the defendant that they were held for defendant. *Pratt Chuck Co. v. Crescent Wire and Cable Co.*, 33 Fed. 2d 269."

This conclusion by the Iowa court is clearly unsound. The mere fact that the seller in that case treated the goods as belonging to the buyer actually was no indication that the seller thereby had notified the buyer that the goods were thereafter held by the seller as bailee for the buyer.

The *Pratt Chuck Co.* case does not support that

statement. In that case the defendant buyer retained possession of the machine and although offering to return it to the plaintiff, never did so.

The cases cited in the defendant's brief, page 47, establish that the giving of the notice specified in Section 63(3) of the Act is a condition precedent to the right of the seller to sue for the price under that section. That is supported by the following additional decisions:

Dodd v. Stewart, ...Pa......., 120 Atl. 121.

G. Robison & Co. v. Kram, 195 App. Div. 873, 187 N.Y.S. 628.

Henderson Importing Co., Inc. v. Breidbart, 182 N.Y.S. 169 (S. Ct., App. Term).

Mindlin v. Freydberg, 171 N.Y.S. 250 (S. Ct., App. Term).

Several of these decisions are of particular importance for the reason that, at the time of the buyer's repudiation of the contract, the property was held by a bailee. In *Dodd v. Stewart*, supra, the boat which was the subject of the contract of sale, was in a shipyard. In *Western Hat & Mfg. Co. v. Berkner Bros., Inc.*, 172 Minn. 4, 214 N.W. 75, cited in the defendant's brief, page 47, the goods apparently were held by a carrier.

It is apparent, therefore, that the overwhelming weight of authority requires the actual giving of the notice as a condition precedent to the right of the buyer to maintain an action for the price.

There is not a scintilla of evidence in this case that the plaintiff notified the defendant that he or anyone else would hold the hops as bailee for the defendant,

nor is there any finding of fact by the trial court that such notice was given.

Section 63(1) of the Uniform Sales Act

1. The plaintiff's argument, pages 53 to 57, fails to consider the issue actually before the court: The effect of the contract upon the passing of title.

Livesley v. Johnston, 45 Or. 30, 76 Pac. 13, 946, is not contrary to the defendant's position. That was a suit for specific performance of a contract to sell hops, brought by the buyer against the seller. Not one word of the contract as quoted in the opinion relates to the passing of title, and the court did not consider the question whether title had passed.

Lehman v. Salzgeber, 124 Fed. 479 (Cir. Ct., Dist. of Ore.), likewise obviously is not applicable here.

The plaintiff completely disregards the fact that these parties have agreed when title to these hops would pass. They were entirely within their rights in so agreeing and no reason has been shown why their agreement should not be honored. The authorities cited under heading VI of our original brief establish clearly that this agreement must be given effect even though the result is to preclude an action by the plaintiff for the price.

2. The plaintiff contends that this was not a cash sale because the plaintiff did not insist upon immediate payment but allowed the defendant additional time to consider the quality of the hops.

There was no obligation on the part of the defendant to pay for the hops when they were weighed. That obligation arose, according to the terms of the contract, upon delivery of the hops by the plaintiff to the defendant and acceptance of them by the defendant.

The plaintiff agreed in writing that the weighing of the hops by the defendant would not constitute an acceptance. It follows that there was no obligation on the part of the defendant to pay for these hops when they were weighed.

There was no extension of the time of payment. The contract provision with respect to payment remained in effect. The only extension related to the time when the hops might be accepted or rejected by the defendant.

Johnson v. Iankovetz, 57 Or. 24, 102 Pac. 799, 110 Pac. 398, is no authority for the position assumed by the plaintiff.

3. The plaintiff apparently has no serious quarrel with our argument under this subheading.

The plaintiff does contend, however, that Section 71-119, Rules 2 and 5, apply to this situation as well as Rule 4 of that Section. Plaintiff evidently is contending that Rule 2 is applicable for the reason that the hops, at the time the contract of sale was entered into, were "specific" goods.

It is respectfully submitted that not one of the cases cited by the plaintiff meets the situation before this court.

Pittenger Equipment Co. v. Timber Structures, Inc.,

50 Or. Adv. 625, 217 Pac. 2d 770, was a suit for specific performance of defendant's contract to deliver lumber to the plaintiff. The court, in reliance upon Section 68 of the Uniform Sales Act, Section 71-168 O.C.L.A., which provides that where the seller has broken a contract to deliver "specific or ascertained goods" a court may if it thinks fit, on the application of the buyer, direct that the contract be specifically performed, said that the lumber described in the contract constituted "specific and ascertained goods" and then decided that specific performance should be granted.

That case is not an authority in support of the plaintiff's contention, however, as there is nothing in the opinion nor in the transcript itself which in any way establishes that the lumber covered by the contract was not fully cut and piled awaiting delivery at the time the contract was made.

Other cases, relating to products of the soil, are cited by the plaintiff. All are distinguishable, however, including the *Pittenger Equipment Co.* case, on this ground in addition to various others: In not one of the cases cited did it appear that it was incumbent upon the seller to remove defective portions of the goods before processing them. Here, the contract covered hops which had yet to be harvested, dried, cured and baled, and required that such hops be of prime quality and otherwise meet the description in the contract. This excluded hops then or thereafter affected by mildew. Prior to the baling of such hops, it is certain that the hops complying with the description in the contract were neither specific nor ascertained. It must also be clear

that it was impossible at the time the contract was entered into for either the plaintiff or the defendant to determine which hops, when harvested, dried, cured and baled, would meet the contract specifications.

The plaintiff evidently considers that Rule 5, Section 19, applies to this case and that as a result title to the hops passed to the defendant upon their delivery to the warehouse. Rule 5, of course, must be read in conjunction with Rule 4(1) and the cases cited under subheading 3 of heading IV in the defendant's brief. By virtue of Section 47 of the Act, Section 71-147 O.C.L.A., the defendant had the right to inspect these hops whether they were specific goods at the time the contract was entered into or were unascertained at that time. This right of inspection was confirmed by the agreement signed by the plaintiff and the defendant when the hops were weighed at the warehouse. Consequently, the cases cited under this subheading in the defendant's original brief establish that any title which passed to the defendant upon the delivery of the hops to the warehouse was conditional and was subject to being defeated by the justifiable rejection of the hops by the defendant. The plaintiff has expressed no criticism of the decisions which support that proposition.

The plaintiff has cited two cases with extensive quotations in general language in an attempt to establish that this action for the price is justified.

Daniels v. Morris, 65 Or. 289, 130 Pac. 397, 132 Pac. 958, arose prior to the enactment of the Uniform Sales Act in Oregon.

The same is true of *Pabst Brewing Co. v. E. Clemens Horst Co.,* 229 Fed. 913 (C.C.A. 9), which arose in California prior to the adoption of the Uniform Sales Act in that state and prior to the decision of *Tomkins v. Erie Railroad Co.,* 304 U.S. 64, 58 S. Ct. 817.

These cases thus do not establish, nor do any others cited by the plaintiff, that this plaintiff may maintain this action for the price without fulfilling the exact requirements of the Uniform Sales Act.

VI

The plaintiff does not criticise the cases cited in the defendant's brief under this heading, but merely comments on *Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958. His argument that the "liquidated damages" provision of the contract does not provide an exclusive remedy, runs directly counter to the express contract provision that the difference between the contract price and the market value of the hops "is hereby agreed to be the measure of damages," and "the said difference between the said contract price and the market value * * * is hereby agreed and fixed and determined as liquidated damages." Analysis of this contract clause shows that the recovery of damages is intended as the only remedy available to the plaintiff. In other words, these parties expressly agreed that under no circumstances should the plaintiff be entitled to recover the price of the hops.

The plaintiff's contention that the measure of dam-

ages specified in this clause cannot be the exclusive remedy because there was no open market at the time and place of delivery of the hops to the warehouse, is completely refuted by the undisputed fact that the market price of 85¢ per pound for late cluster hops which the plaintiff selected in September, prevailed throughout October and until nearly the end of November. It follows that if the plaintiff's hops had been of prime quality, he could have sold them readily at that price to someone other than the defendant.

It is respectfully submitted that the decisions cited in the plaintiff's brief applicable to this heading are not in point, and that *Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958, does support the defendant's position.

CONCLUSION

The defendant respectfully prays that the judgment be reversed and that a judgment be entered on its counterclaim in favor of the defendant and against the plaintiff for $4,000.

Respectfully submitted,

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